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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. GENARO SMITH-BALTIHER, Defendant.	Case No. 07CR3161-LAB HEARING DATE: January 7, 2007 TIME: 2:00 p.m. **THE UNITED STATES' MOTIONS IN LIMINE TO:** **(A) ADMIT A-FILE DOCUMENTS;** **(B) ADMIT LACK OF PERMISSION;** **(C) ADMIT TESTIMONY BY A-FILE CUSTODIAN;** **(D) ADMIT EXPERT TESTIMONY;** **(E) PRECLUDE ALL WITNESSES EXCEPT CASE AGENT;** **(F) PROHIBIT COLLATERAL ATTACK ON DEPORTATION;** **(G) PROHIBIT REFERENCE TO WHY DEFENDANT REENTERED;** **(H) PROHIBIT REFERENCE TO PRIOR RESIDENCY;** **(I) PROHIBIT REFERENCE TO PUNISHMENT;** **(J) PRECLUDE EVIDENCE OF DURESS AND NECESSITY;** **(K) PRECLUDE EXPERT TESTIMONY BY DEFENSE;** **(L) PRECLUDE HEARSAY;** **(M) PRECLUDE ARGUMENT REGARDING WARNING;** **(N) ADMIT 404(b)/609 EVIDENCE;** **(O) ADMIT TRANSCRIPTS;** **(P) ASSIGN BURDENS OF PROOF;** **(Q) FIND AFFIRMATIVE DEFENSE;** **(R) PRECLUDE INSTRUCTIONS;** **(S) PRECLUDE IMPEACHMENT.** **TOGETHER WITH STATEMENT OF FACTS AND MEMORANDUM OF POINTS AND AUTHORITIES.**

COMES NOW the plaintiff, the UNITED STATES OF AMERICA, by and through its counsel, KAREN P. HEWITT, United States Attorney, and Christopher M. Alexander, Assistant United States Attorney, and hereby files its Motions in Limine. These Motions in Limine are based upon the files and records of the case together with the attached statement of facts and memorandum of points and authorities. The United States also hereby renews its motion for reciprocal discovery.

I

STATEMENT OF THE CASE

On November 20, 2006, a federal grand jury in the Southern District of California returned an Indictment charging Defendant Genaro Smith-Baltiher ("Defendant") with being a deported alien found in the United States in violation of 8 U.S.C. § 1326.

II

STATEMENT OF FACTS

A. THE INSTANT OFFENSE

On June 4, 2007, San Diego police officers arrested Defendant for disorderly conduct, being drunk in public, and booked him into the Central Detention Facility in San Diego, California. On June 5, 2007, Immigration Enforcement Agent Meraz encountered Defendant at the Detention Facility and conducted a field interview. During this interview, Agent Meraz determined that Defendant was a citizen and national of Mexico with no legal right to enter or remain in the United States. Subsequently, an Immigration detainer was placed on Defendant.

On June 6, 2007, at approximately 6:00 a.m., Defendant was referred to the custody of United States Immigration and Customs Enforcement. At this time, Deportation Officer Balangue performed records checks and confirmed Defendant's identity, that he is a citizen and national of Mexico, that he had been previously deported from the United States on numerous occasions, and that he had not applied for permission to re-enter the United States. Subsequently, Defendant was advised of his Miranda rights and he elected to invoke his right to counsel.

B. DEFENDANT'S IMMIGRATION HISTORY

Defendant is a citizen of Mexico. Defendant has been removed from the United States to Mexico on five occasions: (1) January 24, 1992, pursuant to an order of an immigration judge following a deportation hearing; (2) August 19, 1993, pursuant to an administrative order reinstating his 1992 order of removal; (3) June 13, 1995, pursuant to an administrative order reinstating his 1992 order of removal; (4) August 25, 1999, pursuant to an administrative order reinstating his 1992 order of removal; and (5) most recently, on July 31, 2006, pursuant to an order of an immigration judge following a deportation hearing. Defendant's deportation orders include May 10, 1994, March 5, 1996, and July 31, 2006.

C. DEFENDANT'S CRIMINAL HISTORY

Defendant has an extensive criminal and immigration history. While Defendant's criminal behavior began in 1982, the United States will only refer to felonies in the last ten years. Defendant was convicted on October 24, 1995 of selling a controlled substance, cocaine, and received four years in jail. On February 10, 1998, Defendant was convicted of illegal reentry in violation of 8 U.S.C. § 1326 (Criminal Case No. 98CR0165-T) for which he received 24 months in custody. Next, on November 4, 1999, Defendant was convicted of illegal entry in violation of 8 U.S.C. § 1325 (Criminal Case No. 99CR3068-GT) for which he received 30 months in custody. He most recently was convicted of false claim to United States citizenship in violation of 18 U.S.C. § 911 (Criminal Case No. 06CR0326-BTM) and was sentenced to 36 months in custody and one year supervised release to run concurrent to the sentence in Criminal Case No. 99CR3068-GT.

III

THE UNITED STATES' MOTIONS IN LIMINE

A pretrial motion is an appropriate means of testing the sufficiency of a proffered defense and precluding evidence thereof if the defense is found to be insufficient. Fed. R. Crim. P. 12(b) ("Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion."); United States v. Peltier, 693 F.2d 96, 97-98 (9th Cir. 1982) (per curiam); United States v. Shapiro, 669 F.2d 593, 596-97 (9th Cir. 1982); see also Fed. R. Crim. P. 12(e). Generally, motions are capable of pretrial determination if they raise issues of law, rather than issues of fact. United States v. Jones, 542 F.2d 661, 664 (6th Cir. 1976).

A. The Court Should Admit A-File Documents

The United States intends to offer documents from the Department of Homeland Security's "A-

File" that corresponds to Defendant's name in order to establish Defendant's alienage, prior deportations, and that he was subsequently found in the United States without having sought or obtained authorization from the Secretary of Homeland Security. The documents are self-authenticating "public records," Fed. R. Evid. 803(8)(B), or, alternatively, "business records." Fed. R. Evid. 803(6).

The Ninth Circuit recently addressed the admissibility of A-File documents in United States v. Bahena-Cardenas, 411 F.3d 1067, 1074-75 (9th Cir. 2005) (denying a challenge based upon Crawford v. Washington, 541 U.S. 36 (2004)). The appellate court held that "the warrant of deportation is nontestimonial because it was not made in anticipation of litigation, and because it is simply a routine, objective, cataloging of an unambiguous factual matter." Id.; see also United States v. Loyola-Dominguez, 125 F.3d 1315 (9th Cir. 1997).

In Loyola-Dominguez, the defendant appealed his § 1326 conviction, arguing, among other issues, that the district court erred in admitting at trial certain records from the illegal immigrant's "A-File." Id. at 1317. The district court had admitted: (1) a prior warrant of deportation; (2) a prior warrant for the defendant's arrest; (3) a prior deportation order; and (4) an order to show cause. The defendant argued that admission of the documents violated the rule against hearsay, and denied him his Sixth Amendment right to confront witnesses. The Ninth Circuit rejected his argument, holding that the documents were properly admitted as public records. Id. at 1318. The Court first noted that documents from a defendant's immigration file, although "made by law enforcement agents, . . . reflect only 'ministerial, objective observation[s]' and do not implicate the concerns animating the law enforcement exception to the public records exception." Id. (quoting United States v. Hernandez-Rojas, 617 F.2d 533, 534-35 (9th Cir. 1980)). The Court also held that such documents are self-authenticating and, therefore, do not require an independent foundation. Id.

Courts in this Circuit have consistently held that documents from a defendant's immigration file are admissible in a § 1326 prosecution to establish the defendant's alienage and prior deportation. See United States v. Hernandez-Herrera, 273 F.3d 1213, 1218 (9th Cir. 2001) (affirming the admission of deportation documents to prove alienage); United States v. Mateo-Mendez, 215 F.3d 1039, 1042-45 (9th Cir. 2000) (district court properly admitted certificate of nonexistence); United States v. Contreras, 63 F.3d 852, 857-58 (9th Cir. 1995) (district court properly admitted warrant of deportation, deportation order and deportation hearing transcript); United States v. Hernandez-Rojas, 617 F.2d at 535 (district court properly admitted warrant of deportation as public record); United States v. Dekermenjian, 508 F.2d 812, 814 n.1 (9th Cir. 1974) (district court properly admitted "certain records and memoranda of the Immigration and Naturalization Service" as business records, noting that records would also be admissible as public records); United States v. Mendoza-Torres, 285 F. Supp. 629, 631 (D. Ariz. 1968) (admitting warrant of deportation); see also United States v. Ray, 920 F.2d 562, 566 (9th Cir. 1990) (admitting welfare documents under the business records exception).

Defendant may attempt to distinguish Hernandez-Herrera. However, the Ninth Circuit could not be more clear when it held that "deportation documents are admissible to prove alienage under the public records exception to the hearsay rule." Hernandez-Herrera, 273 F.3d at 1218.

The Ninth Circuit has made clear that deportation documents are evidence of alienage:

> Although neither a deportation order, see United States v. Sotelo, 109 F.3d 1446, 1449 (9th Cir. 1997) (citing United States v. Ortiz-Lopez, 24 F.3d 53, 55 (9th Cir. 1994)), nor the defendant's own admissions, see United States v. Hernandez, 105 F.3d 1330, 1332 (9th Cir. 1997), standing alone, will support the conclusion that a defendant is an alien, here the government offered Ramirez-Cortez's prior **deportation order**, **admissions Ramirez-Cortez made in his underlying deportation proceeding**, and the testimony of an INS agent that his review of Ramirez-Cortez's immigration records reflected that Ramirez-Cortez was an alien. Based on this evidence, a rational trier of fact could have found beyond a reasonable doubt that Ramirez-Cortez was an alien. Cf. United States v. Sotelo, 109 F.3d 1446, 1449 (9th Cir. 1997) (finding sufficient evidence of alienage where the government's evidence consisted of a prior **deportation order**, the defendant's admissions to an INS agent that he was a Mexican citizen, and his **admissions during the deportation hearing** that he was not a United States citizen); United States v. Contreras, 63 F.3d 852, 858 (9th Cir. 1995) (holding that sufficient evidence supported the conviction when the government introduced a prior **deportation order**, the **deportation hearing transcript**, which indicated that the defendant admitted his Mexican citizenship under oath, and testimony of an INS agent that the defendant was a Mexican citizen).

United States v. Ramirez-Cortez, 213 F.3d 1149, 1158 (9th Cir. 2000) (emphasis added).

The Ninth Circuit has affirmed the admission of orders to show cause, see Sotelo, 109 F.3d at 1449, admissions made during deportation hearings, see id., and transcripts, see Contreras, 63 F.3d at 858. In Sotelo, the Ninth Circuit described a list of evidence that was admitted at trial which supported a defendant's § 1326 conviction:

> The prosecution also presented several documents from the prior deportation proceeding. During the **deportation hearing**, Sotelo admitted, through his lawyer, allegations in the order to show cause that he is not a citizen or national of the United States and he is a native and citizen of Mexico. The prosecution presented the **order to show cause** and

> an **advisement of rights form**, which Sotelo signed. The advisement of rights form stated that Sotelo admitted he was in the United States illegally. Finally, the prosecution presented the order of deportation and the warrant of deportation, evidencing Sotelo's actual deportation.

109 F.3d at 1449 (emphasis added). Regarding the warning to alien ordered deported, it is admissible as evidence of Defendant's intent to violate § 1326 and lack of mistake.

Finally, as noted previously, in Loyola-Dominguez, the Ninth Circuit rejected Defendant's argument that admission of the A-File documents violates his Sixth Amendment right to confront witnesses. Id. at 1318. Nothing has changed. See Bahena-Cardenas, 411 F.3d at 1074-75. Thus, the Crawford holding does not affect the admissibility of statements that qualify for admission under those hearsay exceptions.

The United States will seek to admit the A-File documents as a nontestimonial business records and public documents. Therefore, any Confrontation Clause argument should be rejected. Accordingly, the Court should allow the United States to admit documents from Defendant's A-File.

B. The Evidence of Lack of Permission Is Admissible

It is anticipated that Defendant may argue that the evidence of lack of permission is not admissible. Despite any claims to the contrary, the Certificate of Nonexistence of Record and testimony of the A-File custodian's search of the A-File is admissible.

First, the testimony is not a pretrial testimonial statement and its admission would not violate the Sixth Amendment. These arguments based upon the Confrontation Clause have been rejected. See United States v. Loyola-Dominguez, 125 F.3d 1315 (9th Cir. 1997); see also United States v. Cervantes-Flores, 421 F.3d 825, 831 (9th Cir. 2005) (holding that "the CNR is nontestimonial evidence under Crawford and thus was properly admitted by the district court."). The United States will seek to admit the testimony of the A-File custodian as a nontestimonial business record and public document. Moreover, if the Court allows him to do so, Defendant will have the opportunity to confront the custodian regarding the quality of the records checks. Therefore, any Confrontation Clause argument should be rejected.

Second, any cross-examination regarding the possibility of a nonexistent application for permission is irrelevant. In United States v. Rodriguez-Rodriguez, 393 F.3d 849, 856 (9th Cir. 2005), the defendant sought to elicit testimony on cross-examination from a witness for the United States regarding the following claims: (1) INS computers are not fully interactive with other federal agencies' computers; (2) over 2 million documents filed by immigrants have been lost or forgotten; (3) other federal agencies have the ability and authority to apply for an immigrant to come into the United States; and (4) the custodian never checked with the other federal agencies to inquire about documents relating to the defendant. This Court sustained objections to this line of cross-examination finding that it was irrelevant. Id. The Ninth Circuit agreed stating that "[n]one of that information is relevant on the facts of this case, because it is uncontested that [the defendant] never made any application to the INS or any other federal agency." Id.

As in Rodriguez, Defendant has not presented any evidence that he had applied for reentry. As in Rodriguez, any testimony from witnesses for the United States regarding the types of checks performed to show the lack of an application for reentry would be irrelevant.

This type of cross-examination is also irrelevant to this § 1326 prosecution. The Ninth Circuit has stated what is required for permission to reapply:

> The INS has promulgated regulations that govern the process by which the Attorney General will "[c]onsent to [a deported alien] reapply[ing] for admission[.]" 8 C.F.R. § 212.2. These regulations include the requirement that a deported alien must have remained out-side of the United States for a minimum of five consecutive years. Id. § 212.2(a). Pina-Jaime did not meet this requirement. Nor did he submit the required form I-212 to the INS to obtain consent of the Attorney General to reapply for admission. See United States v. Sanchez-Milam, 305 F.3d 310, 312-13 (5th Cir. 2002), cert. denied, 537 U.S. 1139, 154 L. Ed. 2d 834, 123 S. Ct. 932 (2003). Accordingly, the Attorney General did not "expressly consent[] to [Pina-Jaime's] reapplying for admission" as required by the statute. See 8 U.S.C. § 1326(a)(2).

United States v. Pina-Jaime, 332 F.3d 609, 611-12 (9th Cir. 2003). There is no evidence supporting that Defendant has done so. Accordingly, the Court should admit the Certificate of Nonexistence of Record and permit the A-File custodian to testify regarding Defendant's lack of permission.

C. The A-File Custodian May Testify Regarding A-File Records

The United States intends to call an immigration agent as the custodian of Defendant's A-File. This testimony about the contents of the file, record-keeping procedures, and the meaning of certain documents will be based on personal, on-the-job experience. See Fed. R. Evid. 701 (such testimony is "helpful to a clear understanding of the determination of a fact in issue"); United States v. VonWillie, 59 F.3d 922, 929 (9th Cir. 1995) (in a drug case, the court found that "[t]hese observations are common enough and require such a limited amount of expertise, if any, that they can, indeed, be deemed lay witness opinion"); United States v. Loyola-Dominguez, 125 F.3d 1315, 1317 (9th Cir. 1997) (agent "served as the conduit through which the government introduced documents from INS' Alien Registry File".). The procedure has been implicitly approved by the Ninth Circuit in numerous § 1326 prosecutions. See, e.g. United States v. Mateo-Mendez, 215 F.3d 1039, 1042-45 (9th Cir. 2000); Loyola-Dominguez, 125 F.3d at 1318.

D. The Court Should Admit Testimony From the United States' Expert

At trial, the United States intends to offer testimony of a fingerprint expert to identify Defendant as the person who was previously deported. Additionally, the United States may elicit testimony from an immigration agent as the custodian of Defendant's A-File that may explain the deportation process. Finally, the United States may offer testimony from an adjudications officer regarding the procedures for deriving citizenship.

If specialized knowledge will assist the trier-of-fact in understanding the evidence or determining a fact in issue, a qualified expert witness may provide opinion testimony on the issue in question. Fed. R. Evid. 702. Determining whether expert testimony would assist the trier-of-fact in understanding the facts at issue is within the sound discretion of the trial judge. United States v. Alonso, 48 F.3d 1536, 1539 (9th Cir. 1995); United States v. Lennick, 18 F.3d 814, 821 (9th Cir. 1994). An expert's opinion may be based on hearsay or facts not in evidence where the facts or data relied upon are of the type reasonably relied upon by experts in the field. Fed. R. Evid. 703. In addition, an expert may provide opinion testimony even if the testimony embraces an ultimate issue to be decided by the trier-of-fact. Fed. R. Evid. 704.

E. The Court Should Exclude Witnesses During Trial With The Exception of the United States' Case Agent

Under Federal Rule of Evidence 615(3), "a person whose presence is shown by a party to be essential to the presentation of the party's cause" should not be ordered excluded from the court during trial. The case agent in the present matter has been essential in moving the investigation forward to this point and is considered by the United States to be essential in the presentation of the evidence at trial.

As such, the case agent's presence at trial is necessary to the United States.

F. The Court Should Prohibit Collateral Attack of Prior Deportations

In United States v. Garza-Sanchez, the Ninth Circuit held that a defendant who previously waived his right to appeal, cannot collaterally attack his deportation:

> A defendant charged under 8 U.S.C. § 1326 may not collaterally attack the underlying deportation order if he or she did not exhaust administrative remedies in the deportation proceedings, including direct appeal of the deportation order. [Cites omitted.] Accordingly, a valid waiver of the right to appeal a deportation order precludes a later collateral attack. [Cites omitted.]

217 F.3d 806, 808 (9th Cir. 2000). In this case, Defendant previously, validly waived his right to appeal his deportation order and cannot attack that order at trial. Moreover, Defendant either agreed he was lawfully deported or waived the right to collaterally attack his deportations in his prior convictions.

Additionally, the lawfulness of Defendant's prior deportation order is not an element of the offense in a prosecution under 8 U.S.C. § 1326. Therefore, this issue should not be submitted to the jury for determination of the lawfulness of the deport.

In United States v. Alvarado-Delgado, 98 F.3d 492 (9th Cir. 1996), the Ninth Circuit overruled its prior decision in United States v. Ibarra, 3 F.3d 1333 (9th Cir. 1993), in so far as it held that the lawfulness of a prior deportation is an element of the offense under § 1326. Alvarado-Delgado, 98 F.3d at 493. The court noted that while some jurisdictions hold that a prior deportation is an element of the offense if the deportation is "lawful," the statute itself contains no such limitation, stating simply "[a]ny alien who has been arrested and deported or excluded or deported," 8 U.S.C. § 1326(1), "will be guilty of a felony if the alien thereafter, enters, attempts to enter, or is at any time found in the United States." 8 U.S.C. § 1326 (2). In fact, the Ninth Circuit has held that all § 1326(b)(2) requires is the alien's "physical removal." See, e.g., United States v. Luna-Madellaga, 315 F.3d 1224, 1227 (9th Cir. 2003).

Because the lawfulness of the prior deportation is not an element of the offense under § 1326, Defendant does not have a right to have the issue determined by a jury. Moreover, Defendant has not challenged the lawfulness of his deportation.

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G. The Court Should Prohibit Reference To Why Defendant Reentered the United States

Defendant may attempt to offer evidence that he was seeking medications or to visit family members as the reason for his reentry. The Court should preclude him from doing so.

Evidence of why Defendant violated § 1326 is irrelevant to the question of whether he did so -- the only material issue in this case. The case of United States v. Komisaruk, 885 F.2d 490 (9th Cir. 1980) is illustrative. There, Komisaruk was convicted of willfully damaging government property by vandalizing an Air Force computer. Id. at 491. On appeal, she argued that the district court erred in granting the government's motions in limine to preclude her from introducing her "political, religious, or moral beliefs" at trial. Id. at 492. In particular, she argued that she was entitled to introduce evidence of her anti-nuclear war views, her belief that the Air Force computer was illegal under international law, and that she was otherwise morally and legally justified in her actions. Id. at 492-93. The district court held that her "personal disagreement with national defense policies could not be used to establish a legal justification for violating federal law nor as a negative defense to the government's proof of the elements of the charged crime," Id. at 492, and the Ninth Circuit affirmed. Similarly here, the reason why Defendant reentered the United States is irrelevant to any fact at issue in this case.

H. The Court Should Prohibit Reference To Prior Residency

If Defendant seeks to introduce evidence of any former residence in the United States, legal or illegal, at trial, the Court should preclude him from doing so. Such evidence is not only prejudicial, but irrelevant and contrary to Congressional intent.

In United States v. Ibarra, the district court granted the United States' motion in limine to preclude Ibarra from introducing "evidence of his prior legal status in the United States, and the citizenship of his wife, mother and children" in a § 1326 prosecution. 3 F.3d 1333, 1334 (9th Cir. 1993) overruled on limited and unrelated grounds by United States v. Alvarado-Delgado, 98 F.3d 492, 493 (9th Cir. 1996). He appealed, and the Ninth Circuit affirmed, reasoning that, because Ibarra had failed to demonstrate how the evidence could possibly affect the issue of his alienage, the district court properly excluded it as irrelevant. Id.

Similarly, in United States v. Serna-Vargas, 917 F. Supp. 711 (C.D. Cal. 1996), the defendant filed a motion in limine to introduce evidence of what she termed "defendant facto" citizenship as an affirmative defense in a Section 1326 prosecution. Id. at 711. Specifically, she sought to introduce evidence of:

> (1) involuntariness of initial residence; (2) continuous residency since childhood; (3) fluency in the English language; and (4) legal residence of immediate family members.

Id. at 712.

Judge Rafeedie denied the motion, noting that "none of these elements are relevant to the elements that are required for conviction under Section 1326." Id. at 712. He also noted that admission of the evidence would run "contrary to the intent of Congress." Id. In particular, he noted that, under Section 212 of the Immigration and Naturalization Act of 1952 (codified at 8 U.S.C. § 1182(c)), the Attorney General may exercise her discretion not to deport an otherwise deportable alien, if the alien has lived in the United States for 7 years. Id. at 712-13. The factors which the defendant relied upon to establish her "defendant facto" citizenship, Judge Rafeedie noted, are "among the factors the Attorney General considers in deciding whether to exercise this discretion." Id. at 713.

Thus, Judge Rafeedie reasoned, "the factors that [the defendant] now seeks to present to the jury are ones that she could have presented to the jury are ones that she could have presented the first time she was deported." Id. Therefore, he held, "[a]llowing her to present the defense now would run contrary to Congress' intent." Id. In particular, "under the scheme envisioned by Congress, an alien facing deportation may present evidence of positive equities only to administrative and Article III judges, and not to juries." Id. (emphasis added).

I. The Court Should Prohibit Reference To Defendant's Health, Age, Finances, Education, and Potential Punishment

Evidence of, and thus argument referring to, Defendant's health, age, finances, education, and potential punishment is inadmissible and improper.

Rule 403 provides further that even relevant evidence may be inadmissible "if its probative value is substantially outweighed by the danger of unfair prejudice." The Ninth Circuit Model Jury Instructions explicitly instruct jurors to "not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy." § 3.1 (2000 Edition).[1]

Reference to Defendant's health, age, finances, education, and potential punishment may be relevant at sentencing. However, in an illegal entry trial, such reference is not only irrelevant and unfairly prejudicial, but a blatant play for sympathy and jury nullification as well.

J. The Court Should Preclude Evidence of Duress and Necessity

Courts have specifically approved the pretrial exclusion of evidence relating to a legally insufficient duress defense on numerous occasions. See United States v. Bailey, 444 U.S. 394 (1980) (addressing duress); United States v. Moreno, 102 F.3d 994, 997 (9th Cir. 1996) (addressing duress). Similarly, a district court may preclude a necessity defense where"the evidence, as described in the defendant's offer of proof, is insufficient as a matter of law to support the proffered defense." United States v. Schoon, 971 F.2d 193, 195 (9th Cir. 1992).

In order to rely on a defense of duress, Defendant must establish a prima facie case that:

(1) Defendant committed the crime charged because of an immediate threat of death or serious bodily harm;

(2) Defendant had a well-grounded fear that the threat would be carried out; and

(3) There was no reasonable opportunity to escape the threatened harm.

United States v. Bailey, 444 U.S. 394, 410-11 (1980); Moreno, 102 F.3d at 997. If Defendant fails to make a threshold showing as to each and every element of the defense, defense counsel should not burden the jury with comments relating to such a defense. See, e.g., Bailey, 444 U.S. at 416.

A defendant must establish the existence of four elements to be entitled to a necessity defense:

(1) that he was faced with a choice of evils and chose the lesser evil;

(2) that he acted to prevent imminent harm;

(3) that he reasonably anticipated a causal relationship between his conduct and the harm to be avoided; and

(4) that there was no other legal alternatives to violating the law.

See Schoon, 971 F.2d at 195; United States v. Dorrell, 758 F.2d 427, 430-31 (9th Cir. 1985). A court may preclude invocation of the defense if "proof is deficient with regard to any of the four elements." See Schoon, 971 F.2d at 195.

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[1] Additionally, it is inappropriate for a jury to be informed of the consequences of their verdict. United States v. Frank, 956 F.2d 872, 879 (9th Cir. 1991).

The United States hereby moves for an evidentiary ruling precluding defense counsel from making any comments during the opening statement or the case-in-chief that relate to any purported defense of "duress" or "coercion" or "necessity" unless Defendant makes a prima facie showing satisfying each and every element of the defense. The United States respectfully requests that the Court rule on this issue prior to opening statements to avoid the prejudice, confusion, and invitation for jury nullification that would result from such comments.

K. The Court Should Preclude Any Expert Testimony By Defense Witnesses

The United States requests permission to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of Defendant, which Defendant intends to introduce as evidence in his case-in-chief at trial or which were prepared by a witness whom Defendant intends to call at trial. Moreover, the United States requests disclosure of written summaries of testimony that Defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial. The summaries are to describe the witnesses' opinions, the bases and reasons for those opinions, and the witnesses' qualifications. While defense counsel may wish to call an expert to testify, Defendant must provide notice of any expert witness and any reports by expert witnesses. Accordingly, Defendant should not be permitted to introduce any expert testimony.

If the Court determines that Defendant may introduce expert testimony, the United States requests a hearing to determine this expert's qualifications and relevance of the expert's testimony pursuant to Federal Rule of Evidence 702 and Kumho Tire Co. v. Carmichael, 526 U.S. 137, 150 (1999). See United States v. Rincon, 11 F.3d 922 (9th Cir. 1993) (affirming the district court's decision to not admit the defendant's proffered expert testimony because there had been no showing that the proposed testimony related to an area that was recognized as a science or that the proposed testimony would assist the jury in understanding the case); see also United States v. Hankey, 203 F.3d 1160, 1167 (9th Cir. 2000).

L. Self-Serving Hearsay Is Inadmissible

Defendant's out of court statements are inadmissible hearsay when offered by Defendant through witnesses. Defendant cannot rely on Fed. R. Evid. 801(d)(2) because he is not the proponent of the evidence, and the evidence is not being offered against him. Defendant cannot attempt to have "self-serving hearsay" brought before the jury without the benefit of cross-examination. See, e.g., United States v. Ortega, 203 F.3d 675, 679 (9th Cir. 2000); United States v. Fernandez, 839 F.2d 639, 640 (9th Cir. 1988); see also United States v. Alarcon-Simi, 300 F.3d 1172 (9th Cir. 2002) (holding that the defendant's post-arrest statement was not admissible as an excited utterance).

In this case, the United States anticipates that Defendant may attempt to have the United States' witnesses testify about certain statements which Defendant made to Agents. Thus, the United States moves, in limine, to prohibit Defendant from eliciting self-serving hearsay from: (a) the United States' witnesses or (b) defense witnesses.

M. The Court Should Preclude Defendant from Arguing Permission to Reenter Based Upon Warning to Alien Deported

The Court should precluded any argument that Defendant believed he was not required to obtain the permission from the Attorney General or his designated successor the Secretary of the Department of Homeland Security prior to reentry into the United States or he believed he had permission to enter the United States based on any confusion or alleged error in the execution of the I-294 Warning to an Alien Deported. See United States v. Ramirez-Valencia, 202 F.3d 1106, 1109-10 (9th Cir. 2000) (holding that any such a claim is legally insufficient and improper argument).

N. The Court Should Admit 404(b) and 609 Evidence

Defendant was provided a copy of his rap sheet and many of his conviction records. The United States intends to introduce his extensive criminal and immigration history as 404(b) and 609 evidence.

As evidence of other acts, the United States intends to introduce his 1998 conviction of illegal reentry of deported alien in violation of 8 U.S.C. § 1326, his 1999 conviction of illegal entry in violation of 8 U.S.C. § 1325, his 2006 conviction of false claim to United States citizenship in violation of 18 U.S.C. § 911, and his immigration history in which he has been removed or excluded from the United States to Mexico on January 25, 1992, August 19, 1993, June 13, 1995, August 25, 1999, and July 31, 2006.

These crimes, wrongs, or acts are relevant to Defendant's current case. Rule 404(b) of the Federal Rules of Evidence precludes the admission of evidence of "other crimes . . . to prove the character of a person in order to show action in conformity therewith." Fed. R. Evid. 404(b). Evidence of other crimes, however, is admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Fed. R. Evid. 404(b).

The Ninth Circuit has adopted a four-part test to determine the admissibility of evidence under Rule 404(b). See United States v. Montgomery, 150 F.3d 983, 1000-01 (9th Cir. 1998). The court should consider the following: (1) the evidence of other crimes must tend to prove a material issue in the case; (2) the other crime must be similar to the offense charged; (3) proof of the other crime must be based on sufficient evidence; and (4) commission of the other crime must not be too remote in time. Id. In addition to satisfying the four-part test, evidence of other crimes must also satisfy the Rule 403 balancing test - its probative value must not be substantially outweighed by the danger of unfair prejudice. See Fed. R. Evid. 403.

In United States v. Graham, 575 F.2d 739, 740 (9th Cir. 1978), the defendant was being prosecuted for § 1326 and had previously been convicted of "being illegally in the United States." The district court admitted a probation officer's testimony that the defendant was the same person that had previously been convicted of "being illegally in the United States." Id. The defendant appealed arguing that the probation officer's testimony was not admissible. Id. Holding that "[t]his appeal approaches the frivolous," the Ninth Circuit affirmed. Id.

Similarly, in United States v. Bejar-Matrecios, 618 F.2d 81, 83-84 (9th Cir. 1980), the district court admitted the defendant's prior § 1325 conviction in his § 1326 prosecution. The Ninth Circuit held that a prior § 1325 conviction is relevant to a § 1326 prosecution. Id. However, the certified copy of the judgment and commitment order was too prejudicial because it was not introduced with a limiting instruction. Id.

Here, the United States will be requesting a limiting instruction. Defendant's prior § 1326, § 1325, and § 911 convictions and prior removals prove that he is an alien, he was previously deported, and he intended to enter the United States without permission, elements that Defendant may challenge at trial. The proof of Defendant's removals would be made by witnesses and certified records. Defendant's conviction and removals occurred within 10 years of the date of the offense. Moreover, with a limiting instruction, the probative value is not substantially outweighed by any prejudicial effect.

These crimes, wrongs, or acts are also relevant to Defendant's trustworthiness. Defendant's trustworthiness would tend to make the existence of facts that are of consequence more or less probable.

As impeachment, the United States will introduce Defendant's October 4, 1993 conviction for selling a controlled substance, rock cocaine, for which he received three years in jail and October 24, 1995 conviction for selling a controlled substance, rock cocaine, for which he received four years in jail. The United States will request the convictions be redacted prior to introduction.

Federal Rule of Evidence 609(a) provides in pertinent part:

> For purposes of attacking the credibility of a witness, (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

Fed. R. Evid. 609(a) (emphasis added).

The Ninth Circuit has listed five factors that the district court should balance in making the determination required by Rule 609. United States v. Browne, 829 F.2d 760 (9th Cir. 1987). Specifically, the court must consider: (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness' subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the defendant's credibility. Id. at 762-763. The Ninth Circuit applied these factors in United States v. Martinez, 369 F.3d 1076, 1088 (9th Cir. 2004), and affirmed the defendant's impeachment with a sanitized drug conviction in a § 1326 prosecution.

In this case, it is anticipated that Defendant will dispute at least one of the elements. Thus, as in Martinez, his credibility is squarely at issue in this § 1326 prosecution. If Defendant chooses to testify at trial, the United States should not be prevented from demonstrating Defendant's lack of trustworthiness by utilizing his prior convictions for impeachment purposes. Moreover, Defendant's false claim and false identification convictions are crimes of dishonesty that must be admitted.

O. Certified Transcripts

The United States will ask the Court to take judicial notice of the certified copy of the following transcripts: (1) the February 10, 1998 disposition in Case No. 98CR0165-T, (2) the November 4, 1999 disposition in Case No. 99CR3068-GT, and (3) the July 24, 2006 disposition in 06CR0326-BTM. These certified copies of the transcripts are official court documents and are presumed to accurately reflect testimony during proceedings. See 28 U.S.C. § 753(b); Fed. R. Evid. 803(8)(B), 902(4); United States v. Lumumba, 794 F.2d 806 (2nd Cir. 1986) (permitting a trial transcript as a certified public document under FRE 902(4)); Abatino v. United States, 750 F.2d 1442, 1445 (9th Cir. 1984); United States v. Hoffman, 607 F.2d 280, 286 (9th Cir. 1979); Warth v. Department of Justice, et al., 595 F.2d 521, 523 (9th Cir. 1979). The United States will offer a redacted version of the transcript and only refer to it as sworn testimony in a prior proceeding. The sworn testimony will be Defendant's admissions of his alienage, deportation, lack of permission, and terms of supervised release. This evidence is directly relevant to prove all the elements of the offense. See Fed. R. Evid. 402 (stating in part, "All relevant evidence is admissible"). Defendant's statements are admissible as non-hearsay under Rule 801(d)(2).

Finally, the transcripts are relevant to Defendant based upon his name and the name used in the proceedings. The United States need only make a prima facie showing of a "connection between the proffered exhibit and the defendant." United States v. Tank, 200 F.3d 627, 630-31 (9th Cir. 2000) (internal quotations omitted). The Ninth Circuit has held that once a record is authenticated, it will suffice to establish that the alien stands convicted of the recorded crime, barring evidence to the contrary, if there is an identity between the name of the alien and the name stated on the record. See Corona-Palomera v. INS, 661 F.2d 814, 816 (9th Cir. 1981) (holding that "identity of names sufficiently links a document to a person") (citing Pasterchik v. United States, 400 F.2d 696, 701 (9th Cir. 1968) (regarding proof of a prior conviction to support criminal charges of transportation of firearms by one convicted of a felony)). The United States will provide Defendant with a redacted version of the transcript in advance of trial.

P. The Court Must Properly Allocate Burdens of Proof Regarding Derivative Citizenship

The Ninth Circuit stated "[b]ecause alienage is an element of the offense, Smith is entitled to have the jury determine that question at trial." See United States v. Smith-Baltiher, 424 F.3d 913, 921 (9th Cir. 2005). "Because derivative citizenship would negate that element of the offense, Smith must be allowed to present that defense to the jury. " Id. at 922.

While the Smith decision references 8 U.S.C. § 1401(g) in holding that citizenship is not dependant upon the award of a certificate and analyzing under the harmless error standard, it does not hold that § 1401(g) is to be applied to Defendant's case. See id. at 921, 922 n.8. "The applicable law for transmitting citizenship to a child born abroad when one parent is a U.S. citizen is the statute that was in effect at the time of the child's birth." United States v. Viramontes-Alvarado, 149 F.3d 912, 915 (9th Cir. 1998) (internal quotations omitted). Former 8 U.S.C. § 1401(a)(7) grants citizenship at birth to a person born outside the geographical limits of the United States or its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States for a period or periods totaling not less than 10 years, at least 5 of which were after attaining the age of 14 years. Since Smith was born in 1961, former 8 U.S.C. § 1401(a)(7) applies.

Finally, evidence of foreign birth gives rise to a rebuttable presumption of alienage, and the burden then shifts to the alien applicant to prove citizenship. See Corona-Palomera v. INS, 661 F.2d 814, 818 (9th Cir. 1981). The Smith decision does nothing to change this presumption. Therefore, the jury must be informed of the presumption in analyzing Defendant's derivative citizenship claim.

Q. Defendant's Argument Regarding Lack of Permission Is An Affirmative Defense

Unlike the decision in Smith-Baltiher, Defendant is charged with a "found in" offense. As a result, any belief that he was a citizen, reasonable or not, provides no defense. See Smith-Baltiher, 424 F.3d at 924 ("mistake of fact is not a defense to the general intent crime of illegal reentry under § 1326.").

In the Smith-Baltiher decision, the appellate court noted that "[a]ssuming that Smith could have shown both (1) facts justifying his reliance on his belief that he did not need the Attorney General's permission and (2) a legal theory on which to base a reasonable belief that he was a citizen, he was entitled to offer a defense of mistake of fact." See Smith-Baltiher, 424 F.3d at 925.

This holding places the burden on Defendant to show this defense, not the United States to refute it. This holding is consistent with other defenses based upon a reasonable belief and the statute. See United States v. Weitzenhoff, 35 F.3d 1275, 1290 (9th Cir. 1993) (holding that "[t]o invoke the entrapment by estoppel defense, the defendant must show that he relied on the official's statement and that his reliance was reasonable in that a person sincerely desirous of obeying the law would have accepted the information as true and would not have been put on notice to make further inquiries.").

It is true that the Ninth Circuit's model jury instruction requires the United States to prove the defendant's lack of permission to re-enter the United States beyond a reasonable doubt. Ninth Circuit Manual of Model Jury Instructions – Criminal § 9.5; see United States v. Rivera-Relle, 333 F.3d 914, 919 (9th Cir. 2003); United States v. Mateo-Mendez, 215 F.3d 1039 (9th Cir. 2000). However, unlike a true "element," lack of permission to re-enter is more like an affirmative defense. The Fifth Circuit has stated,

> [I]t is unclear whether Attorney General consent is even an element of 8 U.S.C. § 1326 or only an affirmative defense. The "unless" language would seem to indicate that it is an exception and is therefore more in the nature of a defense which the defendant must establish.

United States v. Terrazas-Carrasco, 861 F.2d 93, 96 (5th Cir. 1988). The Supreme Court has never ruled on this question, but in United States v. Mendoza-Lopez, 481 U.S. 828, 830-31 (1987), the Court called the "consent" clause an "exception" to the statute. The Court described section 1326 as providing the following:

> "Any alien who–
> "(1) has been arrested and deported or excluded and deported, and thereafter
> "(2) enters, attempts to enter, or is at any time found in the United States . . .
> "shall be guilty of a felony, and upon conviction thereof, be punished by imprisonment of not mor than two years, or by a fine of not more than $1,000, or both."

Id. at 830-31. In a footnote, the Supreme Court added that the "consent" clause was an "exception" to the statute:

> The statute excepts those aliens who have either received the express consent of the Attorney General to reapply for admission or who otherwise establish that they were not required to obtain such consent. 8 U.S.C. § 1326(2)(A), (B).

Mendoza-Lopez, 481 U.S. at 831, n.2. The Court was not presented with the issue of whether the "consent" clause is an element or an affirmative defense. However, the language suggests that it should more properly be treated as a defense, and not as an element at all. See United States v. Gravenmeir, 121 F.3d 526, 528 (9th Cir. 1997) (holding, in possession of a machine gun prosecution, that "the exceptions contained in part (2) of the subsection establish affirmative defenses to the defined offense."). We think that Congress intended it to be an affirmative defense. After all, the defendant is in a much better position than the United States to know whether he has sought or obtained permission to re-enter the United States. Thus, the burden of establishing this affirmative defense that he did not believe he needed permission to reapply should be on Defendant.

In the alternative, after Defendant has made a prima facie showing, the United States should only be required to negate at least one element of the defense beyond a reasonable doubt in order to obtain a conviction. See United States v. Morton, 999 F.2d 435, 438 (9th Cir. 1993) (addressing self-defense); see also United States v. Keiser, 57 F.3d 847, 851 n.4 (9th Cir. 1995) ("[o]nce a defendant has introduced evidence of self-defense, the burden shifts to the government to disprove it beyond a reasonable doubt."); United States v. Davis, 76 F.3d 311, 315 (9th Cir. 1996) (affirming instruction that "[t]he government must prove beyond a reasonable doubt that [the defendant] did not have a reasonable belief. . . ."). As with the duress and necessity defense, the United States requests that the Court rule on this issue prior to opening statements.

R. Without Admissible Evidence, No Instructions on Defendant's Defense Theory is Appropriate

The Ninth Circuit was careful to note that "we offer no opinion as to the credibility of Smith's evidence. . . ." See Smith-Baltiher, 424 F.3d at 922 n.8. If the Court determines Defendant is allowed to argue his defense based upon citizenship, Defendant will seek an instruction on this defense. However, before any instruction is given, Defendant must show that the instructions are supported by the law and supported by sufficient evidence:

> A defendant is entitled to an instruction on his theory of the case if the theory is legally cognizable **and** there is evidence upon which the jury could rationally find for the defendant. A "mere scintilla" of evidence supporting the defendant's theory, however, is not sufficient to warrant a defense instruction. Yet when there is sufficient evidence, "the right to have the jury instructed as to the defendant's theory of the case is one of those rights 'so basic to a fair trial' that failure to instruct . . . can never be considered

harmless error."

United States v. Mortan, 999 F.2d 435, 437 (9th Cir. 1993) (internal citations omitted and emphasis added). Thus, it is proper for a district court to not give a defense instruction if (1) the defense theory is not supported by the law, see United States v. Sommerstedt, 752 F.2d 1494, 1499 (9th Cir. 1985), or (2) the evidence presented by the defendant cannot meet the instruction's requirements as a matter of law, see United States v. Wofford, 122 F.3d 787, 792 (9th Cir. 1997). Furthermore, where a defendant fails to establish a factual basis for the required elements of a defense, the district court may instruct the jury to disregard any testimony regarding the defense. See Wofford, 122 F.3d at 792.

The Ninth Circuit has repeatedly held that if the defendant does not present sufficient evidence to support an instruction, the district court need not give the requested instruction. See United States v. Castellanos-Garcia, 270 F.3d 773, 777 (9th Cir. 2001) (holding that the district court need not give an instruction on official restraint if there is not sufficient evidence to support that defense theory); United States v. Jackson, 726 F.2d 1466, 1468 (9th Cir. 1984) (affirming the district court's finding that a self-defense instruction was unnecessary because there was insufficient "evidence upon which the jury could rationally sustain the defense."); United States v. Karr, 742 F.2d 493, 497 (9th Cir. 1984) (affirming the district court's decision to refuse to instruct on duress and holding that "[i]f the evidence is insufficient to support the defense as a matter of law, however, the court may exclude evidence of the defense or refuse to instruct on its elements."); United States v. Busby, 780 F.2d 804, 806 (9th Cir. 1986) (holding "that the district court did not abuse its discretion in concluding that [the defendant's] evidence was insufficient to create a jury question on either element of the entrapment defense.").

For example, in Wofford, the defendant began presenting testimony asserting a justification defense. See Wofford, 122 F.3d at 792. The district court stopped the defendant's testimony and conducted a hearing. See id. At the hearing, the district court ruled that the defendant could not satisfy the elements of a justification defense as a matter of law. See id. Next, the district court instructed the jury to disregard the defendant's justification defense testimony. See id. The defendant appealed claiming that the district court improperly excluded the justification testimony since the jury is to resolve disputed fact issues. See id. The Ninth Circuit affirmed and held that since the defendant failed to establish the requirements of a justification defense as a matter of law, he was not entitled to a justification defense instruction and his testimony was properly disregarded. See id. at 792.

Defendant may request a derivative citizenship instruction. However, Defendant will be unable to show he is entitled to this instruction as a matter of law. First, the Immigration and Naturalization Service has not recognized that Defendant is a citizen. Thus, at the time of the offense, he was not a United States citizen.

Second, Defendant must show that his mother is a United States citizen. Defendant proffered a document he said was a delayed birth certificate. The alleged delayed birth certificate is not an official document; it is only an application for a delayed birth certificate.

In 1971, Defendant's mother applied for a delayed birth certificate in the State of New Mexico. On the front side of the application, the applicant completes biographical information. On the back side of the application, the applicant completes two affidavits in support of the application for a delayed birth certificate. The applicant then submits the application for approval. If approved, the approval is noted on the front side in the lower left hand corner of the application. The box in which approval is noted has the following information: (1) confirmed by the following information; (2) date accepted and filed; and (3) by whom the application is accepted. In this case, none of the approval information is completed.

This is for good reason. As noted in the October 9, 1974 Report of Investigation, "New Mexico authorities declined to issue a delayed birth certificate." It was discovered that Defendant's mother's application for a delayed birth certificate was supported by affidavits from Tomasa Baltiher-Torres, her sister, who was 6 years old at the time of her birth and Andres Lujan. In the Report, Defendant's mother stated that Ms. Baltiher-Torres "was born at Madera, Chihuahua, Mexico in 1921, never immigrated to the United States." As a result, Ms. Baltiher-Torres had no personal knowledge of Defendant's mother's place of birth. The Report also stated that when interviewed, Mr. Lujan later stated that he did not know where Defendant's mother was born and did not know what he was signing when he signed the affidavit. In addition to the Report, the United States is in possession of a letter dated October 4, 2002 from New Mexico Vital Records and Health Statistics certifying that there was no record of birth for Maria Baltiher. Any claim that Defendant's mother was issued a United States birth certificate from New Mexico is simply wrong. Thus, Defendant will not be able to produce any document that any government agency has recognized that Defendant's mother is a United States citizen.

Third, as Defendant admitted on July 24, 2006, he will be unable to show that his mother meets any residency requirement for him to have a claim to derivative citizenship. (See Exhibit 1.) Accordingly, Defendant cannot meet the requirements for derivative citizenship as a matter of law and he is not entitled to a derivative citizenship instruction.

In the alternative, if the Court allows this testimony, the Court should evaluate whether it is sufficient for an instruction. If the Court finds that Defendant is not entitled to a derivative citizenship instruction after the close of evidence, the Court should instruct the jury to disregard any testimony regarding Defendant's defenses. See Wofford, 122 F.3d at 792.

S. The Court Should Preclude Impeachment of Inspector Harrison On Collateral Matters

After a jury trial and prior to sentencing in 2003, Inspector Gregory Harrison was interviewed by Probation Officer Christopher Deatrick. During the interview, Inspector Harrison likely told Probation Officer Deatrick that Defendant was taken to a detoxification center after his arrest. On June 13, 2003, Judge Moskowitz began a series of hearings to address this erroneous statement. On June 19, 2003, Defendant was presented with documents showing that he was never taken to a detoxification center. Judge Moskowitz also heard from Inspector Harrison. Inspector Harrison testified that if he told the Probation Officer Defendant was taken to a detoxification center, he made a mistake. Judge Moskowitz agreed.

Since there is no evidence in this case that Inspector Harrison provided perjured testimony, this evidence is irrelevant and should be excluded. See Fed. R. Evid. 402. Moreover, this evidence--whether adduced through extrinsic evidence or on cross-examination--is improper impeachment. See Fed. R. Evid. 608. Finally, even if admissible, the probative value of this evidence is substantially outweighed by unfair prejudice and should be excluded. See Fed. R. Evid. 403.

A defendant's right to present evidence is not absolute; he or she must comply with established rules of evidence and procedure. Perry v. Rushen, 713 F.2d 1447, 1450 (9th Cir. 1983), cert. denied, 469 U.S. 838 (1984). Rule 402 states that "[e]vidence which is not relevant is not admissible." Fed. R. Evid. 402. Rule 608 explicitly provides that "specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided by Rule 609, may not be proved by extrinsic evidence." Fed. R. Evid. 608(b) (emphasis added). Such conduct "may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness . . . ." Fed. R. Evid. 608(b) (emphasis added). Before specific instances under Rule 608 may be introduced against witnesses for the United States, the district court must determine whether its probative value is substantially outweighed by danger of unfair prejudice. See Fed. R. Evid. 403; see also United States v. Rowe, 92 F.3d 928, 933 (9th Cir. 1996) (affirming the district court's refusal to admit impeachment evidence of a prior conviction against a witness for the United States).

The Supreme Court has stated that "the main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. . . . The exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." Delaware v. Van Arsdall, 475 U.S. 673, 678-79 (1986) (internal quotations omitted) (emphasis in original). The Court then stated that district courts have considerable discretion to limit cross-examination:

> It does not follow, of course, that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues. . . . The Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.

Id. at 679 (internal quotations omitted).

In this case, Defendant has not shown how the introduction of this error is relevant. Moreover, this type of extrinsic evidence would create a mini-trial on the Inspector's past behavior, the very distraction Rule 608 seeks to guard against. See United States v. Martz, 964 F.2d 787, 789 (8th Cir. 1992) ("The purpose of barring extrinsic evidence is to avoid holding mini-trials on peripherally related or irrelevant matters."). Similarly, before cross-examining the Inspector on this error, Defendant must show that it affects the Inspector's truthfulness in this case. Inspector Harrison's error was not being untruthful. It was an error. If anything, the introduction of this error is an effort to harass or embarrass Inspector Harrison; a practice banned by Federal Rules of Evidence Rule 611(a)(3). Accordingly, the

Court should exclude extrinsic evidence of and cross-examination on Inspector Harrison' error.

IV

RENEWED MOTION FOR FINGERPRINTS AND RECIPROCAL DISCOVERY

The United States moves for fingerprints and reciprocal discovery. As of today, Defendant has produced no reciprocal discovery. The United States requests that Defendant comply with Rule 16(b) of the Federal Rules of Criminal Procedure, as well as Rule 26.2 which requires the production of prior statements of all witnesses, except for those of Defendant. Defendant has not provided the United States with any documents or statements. Accordingly, the United States intends to object at trial and ask this Court to suppress any evidence at trial which has not been provided.

V

CONCLUSION

For the above stated reasons, the United States respectfully requests that its motions in limine be granted.

DATED: December 17, 2007

Respectfully submitted,

KAREN P. HEWITT
United States Attorney

s/Christopher M. Alexander
CHRISTOPHER M. ALEXANDER
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. GENARO SMITH-BALTIHER, Defendant.	)	Criminal Case No. 07CR3161-LAB CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, CHRISTOPHER ALEXANDER, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of the Trial Memorandum on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

1. Joseph McMullen, Esq.
   Atty for Defendant Genaro Smith-Baltiher

I hereby certify that I have caused to be mailed the foregoing, by the United States Postal Service, to the following non-ECF participants on this case:

None

the last known address, at which place there is delivery service of mail from the United States Postal Service.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 17, 2007.

s/Christopher M. Alexander
CHRISTOPHER M. ALEXANDER